

No. 47481-6-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

TYSON JAMES KILLION,

Appellant.

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On Appeal from the Thurston County Superior Court  
Cause No. 14-1-01159-1  
The Honorable Erik Price, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. The State failed to meet its constitutional burden of proving beyond a reasonable doubt the essential element of identity.
2. The State failed to present sufficient evidence to prove that Tyson Killion was the individual who assaulted Ashley Williams.
3. The prosecutor committed misconduct during closing arguments when he shifted the burden of proof and used Tyson Killion's silence as substantive evidence of guilt.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Where the State established that Tyson Killion was in the general area at the time his girlfriend was assaulted and established that he was upset with his girlfriend, but where the only eyewitness to the actual assault testified that he did not believe Killion was the assailant and Killion's clothing did not match witness descriptions of the assailant, did the State fail to present sufficient evidence to prove beyond a reasonable doubt that Killion was the individual who committed the charged assault? (Assignments of Error 1 & 2)
2. Did the prosecutor commit misconduct by shifting the burden

of proof to the defense and by commenting on Tyson Killion's right to remain silent, when he stated during closing arguments that an innocent person would assert his innocence when questioned by law enforcement and when he urged the jury to use Killion's refusal to claim innocence as substantive evidence of his guilt? (Assignment of Error 3)

### **III. STATEMENT OF THE CASE**

#### **A. PROCEDURAL HISTORY**

The State charged Tyson James Killion with second degree assault (RCW 9A.36.021), with a domestic violence allegation (RCW 10.99.020). (CP 6) The trial court denied the defense motion to exclude the 911 calls made by witnesses at the scene, finding that they were non-testimonial and admissible under the present sense impression exception to the hearsay rule. (TRP 6-9, 40-45)<sup>1</sup> The trial court also denied the defense motion for a mistrial after it was discovered that a prosecution witness was familiar with the judge. (TRP 196-98) The jury convicted Killion as charged. (TRP 411-12; CP 108-09) The court imposed a standard range sentence and ordered only mandatory legal financial obligations.

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<sup>1</sup> The trial transcripts labeled volumes 1 through 3 will be referred to as "TRP." The remaining transcripts will be referred to by the date of the proceeding.

(04/17/15 RP 28; CP 116-18, 123-25) This appeal timely follows.  
(CP 132)

B. SUBSTANTIVE FACTS

In the early evening of July 27, 2014, several citizens observed a commotion near a church soup kitchen in downtown Olympia. (TRP 65, 66, 70, 8084, 96, 136, 323) From about a block and a half away, Kevin Reynolds saw a man wearing a white shirt “dancing around” a woman as they walked in the street. (TRP 96) He then heard the woman yell for help, and saw the man throw the woman to the ground and kick her in the face. (TRP 96) Reynolds called 911, as several people crowded around the woman and others tried to restrain the man. (TRP 97, 98; Exh. 2)

Denise Luikart and Gregory Waldron were driving together when they happened upon the scene. (TRP 65, 80) They saw several people surrounding a woman as she lay on the grass, and saw several others trying to restrain and calm a man who was wearing a white shirt. (TRP 66, 67, 81, 82, 84) They heard the woman screaming and crying, and heard the man yell, “she deserved it” and “she cheated on me.” (TRP 66, 82, 83) They followed the man while Luikart called 911, but lost sight of him in a crowd of people outside the church. (TRP 66, 69, 70, 84)

Luikart and Waldron eventually saw a man they thought was the same person, only he was wearing a purple shirt and a baseball cap. (TRP 70, 85) They pointed him out to responding officers, who attempted to take the man into custody. (TRP 71-72, 86, 136) When officers approached the man in the purple shirt, he initially walked away, then he stopped and produced a tool with a blade. (TRP 138-39) The man pressed the blade to his neck, and said “[t]he bitch broke my heart.” (TRP 139) The man did not surrender to the officers, so they eventually tased him and took him into custody. (TRP 141, 162, 163)

The man, who the officers identified as Tyson Killion, was Mirandized and questioned at the scene by Officer Jeff Herbig. (TRP 163, 169) Officer Herbig asked Killion who was involved in the incident, and he said it was his girlfriend, Ashley Williams. (TRP 171-72) A clearly upset Killion told Herbig that Williams cheated on him. (TRP 173) Herbig asked Killion what happened, and Killion responded that he did not know. (TRP 174) Herbig asked Killion whether he did not know, did not remember, or did not want to say, and Killion again responded, “I don’t know.” (TRP 174)

EMT Russell Herman treated Williams at the scene. (TRP 217) He found Williams sitting on the ground, holding her face and



crying. (TRP 218) Williams kept repeating that she was in pain, and told Herman that she was punched in the face. (TRP 220, 221) William's face was swollen, her nose was bleeding, and several of her front teeth had been knocked loose. (TRP 211) Williams suffered a number of facial fractures that required surgery and specialized treatment. (TRP 281, 282)

Waldron testified that Killion was the man he saw walking away from the incident. (TRP 87-88) Luikart thought the man was Killion but was not positive. (TRP 75-78, 77-78) Reynolds testified that he did not believe Killion was the man he saw kick the woman. (TRP 100-01, 106)

#### **IV. ARGUMENT & AUTHORITIES**

##### **A. THE STATE FAILED TO PROVE THE ESSENTIAL ELEMENT OF IDENTITY, OR THAT KILLION WAS THE MAN WHO ASSAULTED WILLIAMS.**

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvane, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential

elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

The State charged Killion with second degree assault under RCW 9A.36.021(1)(a), which required the State to prove that Killion intentionally assaulted Williams and thereby recklessly inflicted substantial bodily harm. The State was also required to prove beyond a reasonable doubt the “identity of the accused as the person who committed the charged offenses.” State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). In this case, the State failed to present sufficient evidence of identity.

Luikart and Waldron did not see the assault on Williams. (TRP 77, 89) They only saw an agitated man wearing a white shirt break away from the crowd and leave the scene. (TRP 70, 84, 100) But evidence that a person is agitated and runs from the scene of a crime, or evidence that a person may feel that a victim deserved to be assaulted, does not prove beyond a reasonable doubt that the same person committed the assault. Furthermore, Killion was wearing a purple shirt when he was spotted by Luikart

and Waldron at the church. (TRP 70, 85, 138) Finally, Reynolds, the only witness to testify at trial who actually observed the assault on Williams, did not believe that Killion was the assailant. (TRP 100-01, 106)

Killion was clearly upset and angry at Williams when he was contacted by the responding officers, but that does not establish that Killion, and not one of the many other people mingling in the area, was the person who actually kicked Williams. Motive alone does not prove guilt beyond a reasonable doubt. The State failed to meet its burden of proving the identity of Williams' assailant and failed to prove that Killion was that assailant.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). Because the State failed to prove the essential element of identity, Killion's second degree assault conviction must be reversed and dismissed.

B. THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENTS WHEN HE SHIFTED THE BURDEN OF PROOF AND USED KILLION'S SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT.

To prevail on a claim of prosecutorial misconduct, Killion has the burden of showing both improper conduct and its prejudicial effect. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 481, 965 P.2d 593 (1998); State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established if there is a substantial likelihood that the misconduct affected the jury's verdict. Dhaliwal, 150 Wn.2d at 578. In this case, the prosecutor committed prejudicial misconduct during closing statements when he repeatedly argued to the jury that Killion would have denied his involvement when questioned by Officer Herbig if he was truly innocent.

The State bears the burden of proving every element of its case beyond a reasonable doubt, and it may not shift any part of that burden to the defendant. Winship, 397 U.S. at 361; State v. Fleming, 83 Wn. App. 209, 215, 912 P.2d 1076 (1996); Mullaney v. Wilbur, 421 U.S. 684, 701-02, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). A prosecutor therefore commits misconduct if he attempts to shift the burden of proof to the defendant. State v. French, 101

Wn. App. 380, 4 P.3d 857 (2000); Fleming, 83 Wn. App. at 215.

Furthermore, defendants have a constitutional right to remain silent that derives from the Fifth Amendment to the United States Constitution. State v. Easter, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996). The Fifth Amendment places the burden to obtain evidence on law enforcement, and a defendant has no affirmative duty to provide exculpatory evidence. See State v. Heller, 58 Wn. App. 414, 418-21, 793 P.2d 461 (1990); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546 (1990).

In a criminal proceeding, the State may not make closing arguments relating to a defendant's pre- or post-arrest silence to infer guilt from such silence. Easter, 130 Wn.2d at 243. A direct comment on a defendant's silence occurs when the State uses the comment as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt. See State v. Romero, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002) (citing State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). The State may not focus on the defendant's failure to make a statement in such a way as to imply guilt. See State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988).

For example, in Heller, the defendant challenged the

prosecutor's questions regarding whether the defendant had ever gone to the police after her original interrogation. 58 Wn. App. at 418-19. The court found this questioning impermissible because it suggested the defendant's silence "could be interpreted as implying guilt or as a comment on [her] fifth amendment right to remain silent." 58 Wn. App. at 421 (quoting State v. Apostle, 8 Conn. App. 216, 226-27, 512 A.2d 947 (1986)).

Likewise, in State v. Keene, the detective testified that she called the defendant several times to talk and warned him that she would turn the case over to the prosecuting attorney if she did not hear from him again. 86 Wn. App. 589, 592-94, 938 P.2d 839 (1997). The prosecutor subsequently argued that the jury could decide if the defendant's failure to contact the detective was the act of an innocent man. 86 Wn. App. at 594. The appellate court found that the prosecutor's statement was an impermissible comment on Keene's silence, and reversed the conviction. 86 Wn. App. at 594-95.

And in State v. Knapp, the detective who interrogated Knapp testified that he informed Knapp that an eyewitness positively identified him as a burglary suspect. The prosecutor then asked, "Okay. What did Mr. Knapp do in response to that, hearing that

information?” and the detective replied, “Well, he immediately hung his head but did not say anything.” 148 Wn. App. 414, 419, 199 P.3d 505 (2009). Later in the interrogation, the detective informed Knapp that a responding officer also identified him as the burglary suspect. 148 Wn. App. at 419. The prosecutor asked the detective what Knapp’s response was to this information, and the detective responded, “None, really.” 148 Wn. App. at 419.

Then, in closing arguments, the prosecutor told the jury that it could find Knapp guilty of burglary for several reasons, including because “both times that it was mentioned to him that [the eyewitness] identified him and then [a responding officer] identified him, what did he do? He put his head down. *Did he say, ‘No. It wasn’t me’?* [sic] *No.*” 148 Wn. App. at 419-20 (alteration and emphasis in original).

The court of appeals reversed Knapp’s conviction, finding that “the prosecutor impermissibly commented on Knapp’s silence during closing arguments, suggesting that the jury should infer guilt from his failure to deny the accusation.” 148 Wn. App. at 421.

In this case, during the State’s case-in-chief, the following exchange took place between the prosecutor and Officer Herbig:

Q. . . .Did you also ask him what happened that day?

- A. Yes.
- Q. Do you remember specifically what you asked him to start out your conversation?
- A. I asked him who the disturbance involved, and he indicated his girlfriend and indicated said specifically, "Ashley Williams."
- ....
- Q. Did you ask him how Ashley Williams had become injured?
- A. I asked him what occurred physically between them, and his response was, "I don't know."
- Q. Did you continue to ask him more questions about how she had been injured?
- A. Yes.
- Q. About how many times did you attempt to get that information?
- A. Numerous. I explained that officers were obviously talking with her and she had sustained some injuries, and obviously he admitted to being with her and having some sort of disagreement or altercation, but I needed him to be specific about what had happened, and he just kept repeating, "I don't know. I don't know."
- Q. Did you ask him to clarify what he didn't know?
- A. At some point when questioning and his response became repetitive, I clarified, "Do you not know how she became injured, or you just don't remember or are unwilling to share?" He just said, "I don't know." He never denied any sort of physical altercation. His response was noncommittal.

(TRP 171-73) Then, during closing arguments, the prosecutor told the jury:

[Police officers] give suspects's [sic.] the opportunity to say in their own words what happened, and that's what [Herbig] did over and over and over again with the defendant. You all can put yourself in a situation that you can imagine that you're receiving information



that your girlfriend, whom you apparently love, has been injured badly. The police obviously think you did it. They have got you in custody. They just tased you, and they are asking you how did this happen? What would you say if it weren't you? You would say, I don't know what you're talking about, I wasn't there

—

(CP 389-90) At this point, defense counsel objected, arguing that the prosecutor was improperly commenting on Killion's silence.

(TRP 390)

The trial court sustained the objection, instructing the jury to disregard "the question of what would you do personally." (TRP 390) But the prosecutor then continued by saying:

The defendant wasn't silent. He made statements to law enforcement. He didn't invoke his right to remain silent. He didn't basically tell the police you're going to have to prove it. He made statements. He had the opportunity to provide an explanation, a defense, but he didn't. What he said was, "I don't know." Who says that? Someone who either truly doesn't know, who has no idea, and I submit to you that if the defendant were in that position, if he truly didn't know, he didn't hurt Ashley and he didn't know how she got hurt, he might have been somewhat helpful. I don't know —

(TRP 390-91) Defense counsel again objected, asserting that the prosecutor was improperly commenting on Killion's silence and was shifting the burden of proof. This time the court overruled the objection and allowed the prosecutor to continue this line of

argument: “The defendant had the opportunity to make these – give these explanations, but he did not. He said he didn’t know, right?” (TRP 391)

By relying on Killion’s refusal to give additional information as substantive evidence of guilt, the prosecutor impermissibly commented on Killion’s right to remain silent. See Romero, 113 Wn. App. at 790 (citing Easter, 130 Wn.2d at 236; Lewis, 130 Wn.2d at 705). This misconduct was prejudicial because the evidence of guilt, as shown above, was far from overwhelming.

The State’s evidence established that Killion was in the general area when Williams was assaulted, and that he was upset with Williams at the time. But Killion’s clothing did not match the assailants clothing, and Reynolds, the only eyewitness to the actual assault, testified that he did not believe Killion was the assailant. Thus, the State’s evidence that Killion was the person who committed the assault was weak at best. The State’s improper comments to the jury likely tainted the outcome of trial, and require reversal of Killion’s conviction.

## **V. CONCLUSION**

The State failed to present proof beyond a reasonable doubt that Killion was the individual who assaulted Ashley Williams.

Killion's assault conviction must be reversed. Furthermore, the prosecutor committed prejudicial misconduct when he stated during closing arguments that an innocent person would assert his innocence when questioned by law enforcement and when he urged the jury to use Killion's refusal to claim innocence as substantive evidence of his guilt. These statements were highly improper and prejudicial, and also require the reversal of Killion's conviction.

DATED: October 30, 2015



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**CERTIFICATE OF MAILING**

I certify that on 10/30/2015, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Tyson James Killion. 2527 South J Street, Tacoma, WA 98405.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

**October 30, 2015 - 1:46 PM**

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